79-38

UNITED STATES OF AMERICA
IN THE SUPREME COURT

LEOLA PERRY, Administratrix of the Estate of JAMES HERSCHEL PERRY, Deceased,

Plaintiff-Appellant

V

THE KALAMAZOO STATE HOSPITAL

Defendant-Appellee

/

JURISDICTIONAL STATEMENT TO ACCOMPANY NOTICE OF APPEAL FILED PER 28 USC 1257

FIEGER, COUSENS & BOESKY
Attorneys for Plaintiff-Appellant
By: Mark H. Cousens
19390 W. Ten Mile Rd.
Southfield, Michigan 48075
(313) 355-5555

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IN THE SUPREME COURT

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Plaintiff-Appellant,

v No.

KALAMAZOO STATE HOSPITAL,

Defendant-Appellee.
_____/

JURISDICTION STATEMENT
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I

The cause appealed from appeared below as Perry v Kalamazoo State Hospital, 404 Mich 205, 273 NW2d 421 (1978).

II

The grounds which involve the jurisdiction of the United States Supreme Court are as follows:

A. The cause is brought pursuant to the United States Constitution and the Fourteenth Amendment thereto, Clause No. 3.

B. A judgment was entered by the Supreme Court for the State of Michigan in favor of the Appellee on December 27, 1978. An order denying rehearing on the opinion of the court was entered on April 10, 1979. A notice of appeal was filed with the Supreme Court for the State of Michigan on the 9th of July, 1979.

C. Jurisdiction is conferred upon this Honorable Court in accordance with 28 USCA 1257.

D. The jurisdiction of this court is sustained in accordance with the opinion

of this court in Charleston Federal Savings & Loan Assoc v Alderson, 324 US 182, reh'g den 324 US 888 (1945).

E. The state statute under consideration is found as MCL 691.1407 found at V 35, p 800 Michigan Compiled Laws Annotated and reads in its entirety:

> "Government immunity from tort liability continuance.
>
> "Section 7. Except as in this act otherwise provided, all government agencies shall be immune from tort liability in all cases wherein said government agency is engaged in the exercise and discharge of a government function. Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is hereby affirmed. PA 1964, No 170, §7, effective July 1, 1965."

III

The questions presented by this appeal are:

A. Does a state statute which makes immune the state and its agencies from an action for negligence deny to the Plaintiff-Appellant a fundamental personal right, to-wit: the right to seek health care?

1. Is there a fundamental personal right to choose a form of health care?

2. Does a state impinge upon the zone of privacy associated with a fundamental personal right to health care where an effect of a statute making immune the state from

liability is to chill freedom of choice where such statute makes immune a mental health facility, but does not make immune general hospitals?

B. Does the State of Michigan deny to the Plaintiff-Appellant the equal protection of the laws when it impresses an immunity in favor of itself and all of its agencies for the negligent administration of health care?

1. Does a statute impressing immunity, as interpreted, which interpretation provides the right to sue to persons accorded negligent treatment at public general hospitals while denying the same cause of action to persons receiving negligent treatment at public mental health facilities

deny to the Plaintiff-Appellant the equal protection of the laws?

2. Does the statute bear no reasonable relationship to the objects of the legislation in that it is not tuned to alternative considerations, in that, inter alia, it is overbroad?

3. Does the statute, as interpreted, place a far greater burden upon a class of persons defined by its economic status in that the statute will operate to deny to consumers of state-provided mental health services a cause of action for the negligent administration of such services where such consumers are overwhelmingly poor?

IV

Statement of the Case

James Herschel Perry was killed on November 14, 1972, while a resident of a mental health facility operated by the State of Michigan. His death was accomplished as a result of the negligent acts of a resident attendant attempting to restrain Mr. Perry. A subsequent inquest found excusable homicide, and a civil action was initiated by the Plaintiff-Appellant, the decedent's widow, in the Court of Claims for the State of Michigan. A summary judgment was granted by the Court of Claims on August 4, 1975, with an appeal taken to the Michigan Court of Appeals which affirmed the dismissal in a

summary fashion on September 24, 1976. An application for leave to appeal was made to the Supreme Court for the State of Michigan which application was granted on August 29, 1977.

By an opinion dated December 27, 1978, the Supreme Court for the State of Michigan affirmed, holding that the operation of a state mental health facility is a "government function" as that function was redefined by the Supreme Court. 404 Mich 205. The court held that the operation of a state mental health facility is so identified with the objects of government as to compel the conclusion that the agency is immune for the negligence of its employees. On the same day, the Supreme Court decided

Parker v Highland Park General Hospital, 404 Mich 183, wherein the court concluded that, in contrast to the decision in Perry, the operation of a general hospital was not so identified with the act of governing as to be immune.

The constitutional question presented by the Appellant was raised by the Appellant in her brief to the Supreme Court for the State of Michigan. The question was argued, orally, as well.

The Supreme Court for the State of Michigan declined to pass upon the federal question presented, and no part of the opinion of that court addresses the question raised.

V

On a number of prior occasions, this court has recognized the existence of certain personal and fundamental rights not explicity mentioned in the Constitution of the United States. Prominent among these rights have been the right to travel, education, procreation and marriage. This court has further recognized that associated with these fundamental rights is the existence of a concomitant zone of privacy into which a state may not intrude. For example, this court has held that a state may not exact legislation which interferes with personal decisions affecting marriage. Griswold v Connecticut, 381 US 479, 85 S Ct 1678 (1965). The instant case represents

a vivid instance of state legislation that affects the right to health care: the clear effect of the statute is to "chill" the very private and personal decision of which form of health care to seek. The decisions of the Michigan Supreme Court in this cause and in Parker v Highland Park General Hospital, 404 Mich 183, allow a cause of action for the negligent administration of health care to persons who are injured at a state-operated general hospital while denying such a cause of action to persons injured at a state-operated mental health facility. While subtle, this does, in fact, potentially affect the choice of health care as a direct result of the imposition of immunity. A person

may choose to decline to seek a form of health care because of the prohibition on the right to seek redress for injury. This clearly constitutes an interference with a right which is both private and fundamental. Plaintiff-Appellant asserts that this court should afford legal recognition to the notion that each individual has a fundamental right to adequate health care and that this right is an essential addition to the penumbra of individual protections already afforded by the Constitution. A statute imposing immunity affects that fundamental right.

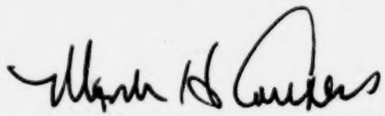
Modern science and medicine have recognized the integral relationship between the health of the body and the

health of the mind. Today, the ill health of an individual does not automatically mandate treatment merely of his physical symptoms. Rather, the medical profession seeks to treat the whole individual. There exists, then, an interrelationship between this nation's general health facilities and its correlative facilities for mental health. Wise social policy would accord equal recognition to these publicly-funded treatment centers. This is not the case in Michigan: the statute before this court, as interpreted by the Supreme Court for the State of Michigan, is on its face a denial of equal protection of the laws.

Denial of equal protection occurs because the Michigan immunity statute, as

interpreted by the Michigan Supreme Court, creates a striking disparity in health treatment between those citizens seeking treatment in a public general hospital rather than in a public mental hospital. That is, individuals in a public general hospital are afforded the right to a civil action in tort while that remedy is unavailable to residents of a public mental health facility. This form of discrimination is particularly invidious when one considers that an individual cannot be held responsible for the type of ailment from which he suffers. Imposition of such a legal disability is both illogical and unjust: it fundamentally denies that legal burdens must bear some relationship to individual

responsibility of wrongdoing.



FIEGER, COUSENS & BOESKY
Attorneys for Plaintiff-
Appellant
MARK H. COUSENS (P 12273)
19390 West Ten Mile Road
Southfield, Michigan 48075
(313) 355-5555

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AMENDED COMPLAINT

(State of Michigan
In the Court of Claims)

(Filed February 18, 1975)

Now comes Leola Perry, as administratrix of the Estate of James Herschel Perry, Deceased, by and through her Attorneys, Fieger, Golden & Cousens, and for her Amended Complaint says:

1. That Plaintiff is the administratrix of the Estate of James Herschel Perry, deceased, a resident of Kalamazoo County, State of Michigan, at the time of his death.

2. That Defendant Kalamazoo State Hospital is an institution of the State of Michigan, created by Act 151 of 1923, and as amended by the Public Acts of 1969, No. 100, and the recipient of appropriations by the legislature, but that said hospital does engage in both a governmental function and a proprietary function in the treatment of its patients.

3. That Defendant hospital is located in the County of Kalamazoo.

4. That the deceased James Herschel Perry was a patient residing at Defendant hospital from approximately July, 1972 until the date of his death November 14, 1972.

5. That Defendant hospital has a duty to provide for the care, treatment, and custody of its patients.

6. That Defendant hospital breached its duty in that on or about the evening of November 14, 1972 an employee of Defendant Hospital caused the death of

James Herschel Perry by applying such force to the deceased's neck as to produce unconsciousness. Further, this force caused aspiration of the stomach contents and hemorrhages in the bronchial alveoli area thereby causing the death of James Herschel Perry.

7. That the injuries so inflicted upon James Herschel Perry resulted in his death on the fourteenth day of November, 1972 within three years prior to the commencement of this suit.

8. That deceased left surviving him a widow and minor children who have been deprived of the financial support and the society and companionship of the deceased.

9. That deceased's estate became liable for medical, hospital, funeral and burial expenses and is further damaged by Plaintiff's decedent's pain and suffering while conscious in the period intervening between the time of inflicting of said injuries by Defendant's employee and the death of said decedent.

Wherefore, Leola Perry, Plaintiff prays that this Honorable Court render a judgment in her favor and against Defendant in the amount of One Million ($1,000,000.00) Dollars.

FIEGER, GOLDEN & COUSENS

Mark H. Cousens (P-12273)
Attorneys for Plaintiff
19390 West Ten Mile Road
Southfield, Michigan 48075
(313) 355-5555

Dated: February 14, 1975

ORDER FOR SUMMARY JUDGMENT

(State of Michigan
In the Court of Claims)

(Filed August 4, 1975)

At a session of said Court held in the courtroom of the Court of Claims, 122 South Grand Avenue, Lansing, Michigan, this 4th day of August, 1975.

Present: Honorable James E. Hoff, Circuit Judge Presiding.

Defendant having filed a Motion for Accelerated and in the alternative a Motion for Summary Judgment based upon GCR 1963, 111.1(1) and 117.2(1); the Court having heard argument by respective counsel at a hearing on said motion; the Plaintiff having filed a brief; and the Court being fully advised in the premises, now therefore,

It is ordered that Motion for Summary Judgment on behalf of the Defendant be and the same hereby is granted for failure of the Plaintiff to allege facts supporting a cause of action; with prejudice and without costs, a public question being involved.

/s/ James E. Hoff
Circuit Judge Presiding

ORDER FOR ACCELERATED JUDGMENT

(State of Michigan
In the Court of Claims)

(Filed August 4, 1975)

At a session of said Court held in the courtroom of the Court of Claims, 122 South Grand Avenue, Lansing, Michigan, this 4th day of August, 1975.

Present: Honorable James E. Hoff, Circuit Judge Presiding.

Defendant having filed a Motion for Accelerated and in the Alternative a Motion for Summary Judgment based upon GCR 1963, 116.1(5); the Court having heard argument by respective counsel at a hearing on said motion; the Plaintiff having filed a brief; and the Court being fully advised in the premises, now therefore,

It is ordered that the Motion for Accelerated Judgment on behalf of the Defendant be and the same hereby is Granted, grounded on sovereign immunity, with prejudice and without costs, a public question being involved.

/s/ James E. Hoff
Circuit Judge Presiding

CLAIM OF APPEAL

(State of Michigan
In the Court of Appeals)

(Filed August 13, 1975)

Leola Perry, as Administratrix of the Estate of James Herschel Perry, Deceased, Plaintiff, claims an appeal from the judgment entered August 4, 1975, in the Court of Claims by the Honorable James E. Hoff.

FIEGER, GOLDEN & COUSENS

By Mark H. Cousens (P 12273)
Attorneys for Plaintiff
19390 West Ten Mile Road
Southfield, Michigan 48075
(313) 355-5555

Dated: August 12, 1975
Southfield, Michigan

MEMORANDUM OPINION

(State of Michigan
In the Court of Appeals)

(Filed)

Before: S.J. Bronson, P.J.; W.R. Beasley and D. Anderson, Jr., JJ.

Plaintiff Leola Perry, Administratrix of the Estate of James Herschel Perry, Deceased, instituted a civil action against defendant Kalamazoo State Hospital for wrongful death, MCLA 600.2922; MSA 27A.2922 claiming negligence on the part of the defendant. On August 4, 1975, the Court of Claims granted summary judgment and accelerated judgment against the plaintiff. Plaintiff now appeals.

An examination of the record and briefs discloses no error.

Affirmed.

PARKER v CITY OF HIGHLAND PARK

Docket No. 55330. Argued October 5, 1977 (Calendar No. 15).—Decided December 27, 1978.

Casey Parker, as next friend of Vincent O. Parker, a minor, and for himself, brought an action for medical malpractice and breach of contract against the City of Highland Park, which owns and operates Highland Park General Hospital, and against others. The Wayne Circuit Court, Joseph G. Rashid, J., granted summary judgment for the city on the ground of governmental immunity. The Court of Appeals, Bashara, P.J., and J. H. Gillis and O'Hara, JJ., denied leave to appeal (Docket No. 17693). Plaintiffs appeal. *Held:*

The operation of the general hospital in this case was not a governmental function, and thus the city did not have governmental immunity.

Justice Fitzgerald, with Chief Justice Kavanagh and Justice Levin concurring, wrote:

1. The question is whether the day-to-day operation of a hospital is a "governmental function" within the meaning of the governmental tort liability act. In the past the Court has held that the operation of a hospital was a governmental function. However, thinking on the nature of government has evolved since that time and to read the statute as preserving for all time the former case law would be to assume that the Legislature failed to recognize that the evolution of case-law precedent is exclusively committed to the judicial branch of

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REFERENCES FOR POINTS IN HEADNOTES

[1, 5, 9, 11, 12] 40 Am Jur 2d, Hospitals and Asylums §§ 22, 24.

[2, 6] 57 Am Jur 2d, Municipal, School, and State Tort Liability §§ 46, 66.

[3] 57 Am Jur 2d, Municipal, School, and State Tort Liability § 46.

[4] 56 Am Jur 2d, Municipal Corporation, Counties, and Other Political Subdivisions § 199.

[7] 57 Am Jur 2d, Municipal Corporations, School, and State Tort Liability §§ 53-55.

[8-10] 57 Am Jur 2d, Municipal, School, and State Tort Liability §§ 31, 32.

Municipal immunity from liability for torts. 60 ALR2d 1193.

government. The term "governmental function" is particularly subject to judicial interpretation because the phrase is of judicial origin.

2. The old judicial definition of governmental function was justified in its time, on its own facts. Today we have a new set of facts described by old nomenclature. Application of the old rule should not be by reference to language alone without regard to the facts.

3. The term "governmental function" should be limited to those activities *sui generis* governmental—of essence to governing. Even though an activity is not proprietary, it does not necessarily follow that the activity is governmental. Although it may be an appropriate goal or objective of government to establish a hospital, it does not follow that the daily operations of the hospital constitute a governmental function. The operation of a hospital is not an activity of a peculiar nature such that the activity can only be done by government. Rather, government participates alongside private enterprise and charitable and religious organizations in operating hospitals. The fact that the government-operated hospital contributes to the "common good" does not distinguish it from a non-government-operated hospital, because hospitals operated by non-government entities, who do not enjoy immunity from tort liability, also contribute to the "common good". The modern hospital, whether operated by a city, a church, or a group of private investors, is essentially a business. As such, there is no rational ground upon which immunity from tort liability for the government-operated hospital can rest.

Justice Moody agreed with the conclusion that the activities of a municipally owned general hospital do not constitute a governmental function. Rather than adopt the position that the Court is statutorily bound by its previous decisions that the operation of a general hospital is a governmental function, particularly in the face of *Pittman v City of Taylor,* 378 Mich 41; 247 NW2d 512 (1976), which erased all common-law immunity precedent, the Court should begin anew its analysis of what a governmental function means under the statute. It should not be assumed that the Legislature failed to recognize that the evolution of case-law precedent is exclusively committed to the judicial branch of government.

1. Participation of modern government in everyday existence is so pervasive that any presumption must rightly run to government responsibility and consequent liability rather than to immunity. Immunity should be viewed as a privilege, limited to those activities uniquely associated with governmental enter-

prise. The concepts of an activity which has no common analogy in the private sector or the distinction between decisional and planning aspects of governmental duties as opposed to the operational aspects may have some significance in given cases, but in other instances they could be misleading or inapplicable.

2. As a basic guideline, the "governmental essence" test should be founded upon the inquiry whether the purpose, planning, and carrying out of the activity, due to its unique character or governmental mandate, can be effectively accomplished only by the government. Unless liability would be an unacceptable interference with government's ability to govern, activities that fall outside this guideline, although performed by a government agency, are not governmental functions and therefore not immune.

3. The question in this case is whether the municipal participation is uniquely associated with governmental enterprise. Although it is not necessarily decisive, the number of private general hospitals is far greater than the number of governmental hospitals in this state. This fact alone would indicate that the function performed by municipal general hospitals is not uniquely served by government, however much the need for public participation remains. Further, though the purpose of maintaining public general hospitals is to enhance the health of the citizens of Michigan, the purpose is not one which can only be effectively accomplished in society by the government. Moreover, a significant consideration is the fact that the government has little direct responsibility for placing patients in public general hospitals. Admitting and discharging patients there is usually a matter of private concern.

4. The day-to-day care afforded to the substantial majority of patients in general hospitals is not of a unique character nor is it the result of governmental mandate. Activities conducted by the staff of a general hospital are not such as can effectively be accomplished only through government participation. The medical practice performed in the emergency room of a municipal general hospital falls outside the scope of a governmental function contemplated by the statute. Further, holding negligent activities of hospital personnel in general hospitals subject to liability is not an unacceptable interference with government's ability to govern.

5. It also should be noted that a full trial is still forthcoming. At trial, plaintiffs will be required to prove their allegations of malpractice by a preponderance of the evidence. Defendant will have a full day in court. Therefore, though the defense of governmental immunity for public general hospitals is removed, all the safeguards of a trial remain.

Reversed and remanded.

Justice Ryan, joined by Justices Williams and Coleman, dissenting, wrote that the operation of a public hospital is a governmental function for purposes of the governmental tort liability act. At common law the expression "governmental function" was the term of art which both described the nature and defined the limits of state and municipal immunity from tort liability. By employing the same term of art in creating statutory immunity, the Legislature appears to have directed the courts to look to the common law for guidance in determining whether, in a given case, a governmental agency is exercising or discharging a "governmental function" for purposes of the immunity statute. Case law before the immunity statute held that the operation of a public hospital to promote the public health is a governmental function. Moreover, the operation of a public hospital is within the "common good of all" definition of a governmental function. The examination, diagnosis, and treatment of patients at a public hospital are activities intended to promote the general public health and are exercised for "the common good of all". Consequently, the negligence of the defendant city alleged in the complaint is within the governmental function of operating its municipal hospital. The defendant city is immune, therefore, from liability for its negligence, if any, by reason of the provisions of the immunity statute.

DECISION OF THE COURT

1. STATES — HOSPITALS — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — WORDS AND PHRASES.

The operation of a general hospital by a city is not a governmental function; therefore the city does not have governmental immunity from liability for medical malpractice in treating a patient at its general hospital (MCL 691.1407; MSA 3.996[107]).

OPINION BY FITZGERALD, J.

2. STATES — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — WORDS AND PHRASES.

The meaning of the term "governmental function" has varied as the judiciary's thinking on the nature of government has evolved; to read the governmental tort liability act as preserving for all time former case law recognizing governmental

immunity would be to assume that the Legislature failed to recognize that the evolution of case-law precedent is exclusively committed to the judicial branch of government (MCL 691.1407; MSA 3.996[107]).

3. STATES — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — STATUTES — COMMON LAW.

Determining whether or not a certain activity is a "governmental function" within the meaning of the governmental tort liability act, in the absence of a legislative definition of the term, is a function committed to the judiciary, particularly because the phrase is of judicial origin (MCL 691.1407; MSA 3.996[107]).

4. STATES — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION.

The term "governmental function" under the governmental tort liability act should be limited to those activities sui generis *governmental—of essence to governing; an activity is not necessarily governmental even though it is not proprietary (MCL 691.1407; MSA 3.996[107]).*

5. STATES — HOSPITALS — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — WORDS AND PHRASES.

The day-to-day operation of a hospital is not a "governmental function" within the meaning of the governmental tort liability act; the modern hospital is essentially a business and the operation of a hospital is not an activity of a peculiar nature such that it can only be done by government (MCL 691.1407; MSA 3.996[107]).

OPINION BY BLAIR MOODY, JR., J.

6. STATES — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — COMMON LAW.

The Supreme Court should begin anew its analysis of what a governmental function means under governmental tort liability act, particularly in the face of its decision which erased all common-law immunity precedent; a construction of the statute as an "affirmation" preserving for all time previous case law would assume that the Legislature failed to recognize that the evolution of case-law precedent is exclusively committed to the judicial branch of government (MCL 691.1407; MSA 3.996[107]).

7. STATES — TORTS — GOVERNMENTAL IMMUNITY.

Participation of modern government in everyday existence is so pervasive that any presumption must rightly run to govern-

ment responsibility and consequent liability rather than to immunity.

8. STATES — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION.

The crux of the governmental essence test for deciding whether a government agency is immune by statute from liability for a tort should be an inquiry whether the purpose, planning and carrying out of the activity, due to its unique character or governmental mandate, can be effectively accomplished only by the government; unless liability would be an unacceptable interference with government's ability to govern, activities that fall outside this guideline, although performed by a government agency, are not governmental functions and therefore the agency is not immune.

9. STATES — HOSPITALS — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION.

Medical practice in the emergency room of a municipal general hospital falls outside the scope of a governmental function contemplated by the governmental tort liability statute because the day-to-day care afforded to the substantial majority of patients in general hospitals is not of a unique character or precipitated by governmental mandate, activities conducted by the staff of a general hospital are not such as can effectively be accomplished only through government participation, and holding negligent activities of hospital personnel in general hospitals subject to liability is not an unacceptable interference with government's ability to govern (MCL 691.1407; MSA 3.996[107]).

DISSENTING OPINION BY RYAN, J.

10. STATES — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — STATUTES — COMMON LAW.

The Legislature, by employing a common-law term of art, "governmental function", in creating statutory immunity from tort liability, appears to have directed the courts to look to the common law for guidance in determining whether, in a given case, a governmental agency is exercising or discharging a "governmental function" for purposes of the governmental tort liability statute (MCL 691.1407; MSA 3.996[107]).

11. STATES — HOSPITALS — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — WORDS AND PHRASES.

Case law before the governmental tort liability act held that the operation of a public hospital to promote the public health is a

"governmental function" and the operation of a public hospital is within the "common good of all" definition of a "governmental function"; therefore the operation of a public hospital is a "governmental function" for purposes of the governmental tort liability act (MCL 691.1407; MSA 3.996[107]).

12. STATES — HOSPITALS — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — WORDS AND PHRASES.

Examination, diagnosis, and treatment of patients at a public hospital are activities intended to promote the general public health and are exercised for the common good of all; consequently alleged negligence of a municipal hospital in failing to discover and remove a piece of glass which was lodged beneath a patient's skin and which remained there after he was treated at the hospital is within the city's governmental function of operating the hospital and the city is immune from liability for its negligence, if any, by reason of the provisions of the governmental tort liability act (MCL 691.1407; MSA 3.996[107]).

Lopatin, Miller, Bindes, Freedman & Bluestone (by *Michael A. Gantz* and *Michael A. Gagleard)* for plaintiffs.

Garan, Lucow, Miller, Lehman, Seward & Cooper (by *Albert A. Miller)* and *David J. Curran,* and *Cozadd, Shangle & Smith* (by *B. Ward Smith* and *Daniel J. Andrews),* of counsel, for defendants.

Amicus Curiae:

Roger E. Craig, Corporation Counsel, *George G. Matish,* Deputy Corporation Counsel, and *Thomas G. Gallagher,* Assistant Corporation Counsel, for the City of Detroit.

FITZGERALD, J. Plaintiff Vincent Parker fell through a glass storm door on September 12, 1970. He was treated for serious lacerations on the back and neck at the emergency room of Highland Park General Hospital, a municipal hospital operated by the City of Highland Park. In 1972, Vincent Parker and his father, Casey Parker, filed a malpractice suit against the hospital; Physicians Emergency Service, the corporation which operated the emergency room; and the doctor who had treated Vincent Parker.

In their complaint plaintiffs alleged that the treating physician had failed to take X-rays, that Vincent Parker had continued to feel pain in his back after treatment at Highland Park General Hospital, and that in 1972 treatment at another hospital revealed that a large piece of glass had remained lodged underneath the skin of Vincent Parker's back since his accident.

The city moved for summary judgment, contending that plaintiffs had failed to state a claim upon which relief could be granted, because the city, as a governmental agency engaged in the exercise or discharge of a governmental function, was immune from tort liability under MCL 691.1407; MSA 3.996(107).[1] The Court of Appeals denied leave to appeal. We granted leave to consider whether the day-to-day operation of a hospital[2] is a "governmental function" as that phrase is used in the statute.

In the past this Court did hold that the operation of a hospital was a governmental function. *Nicholson v Detroit,* 129 Mich 246; 88 NW 695

[1] "Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is affirmed."

[2] Because the case was disposed of below on the governmental immunity issue, the facts on the relationship among the defendants in this case have not been developed. Therefore, we offer no opinion on whether or not the hospital may escape liability because the emergency room was operated by a corporation of which the treating physician was a member, as Highland Park Hospital suggests. Nor do we decide the effect of Dr. Sokolowski's alleged settlement with plaintiffs.

(1902), *Martinson v Alpena,* 328 Mich 595; 44 NW2d 148 (1950).[3]

We do not believe that because we once held the operation of a hospital to be a governmental function we must do so today.[4] A comparison of the reasoning employed by this Court in *Nicholson* with that of *Martinson* shows that the meaning of the term "governmental function" has varied as the judiciary's thinking on the nature of government has evolved.[5]

[3] *Nicholson* involved a hospital for contagious disease. Plaintiff's decedent was a carpenter who contracted smallpox when employed by the City of Detroit in the construction of a new hospital on the site of an existing hospital. Plaintiff alleged that the old building and the grounds were infected with smallpox germs and the city was negligent in exposing the carpenter to the germs. Nonliability was based on the city's performing a "governmental function". To the *Nicholson* Court, performing a governmental function meant that the city was acting as an agent of the state rather than for its own private purposes. See Cooperrider, *The Court, the Legislature, and Governmental Tort Liability in Michigan,* 72 Mich L Rev 187, 222-224 (1973).

Martinson involved a general hospital operated by the City of Alpena. Nurse Madeleine Martinson fell into the elevator shaft. She sued the city, alleging negligence because of a faulty safety catch which allowed the guard door to open when the elevator was at another floor. The Court relied on *Nicholson,* finding a general hospital "within the same category" as a contagious hospital. The Court also applied the "common good of all" test for distinguishing between a governmental and a proprietary function.

" 'The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is, there is no liability; if it is not, there may be liability. That it may be undertaken voluntarily and not under compulsion of statute is not of consequence.' *Gunther v Cheboygan County Road Commissioners,* 225 Mich 619 [196 NW 386 (1923)]; *Johnson v Ontonagon County Road Commissioners,* 253 Mich 465 [235 NW 221 (1931)]; *Daszkiewicz v Detroit Board of Education,* 301 Mich 212 [3 NW2d 71 (1942)]." *Martinson v Alpena,* 328 Mich 595, 598; 44 NW2d 148 (1950).

[4] "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Oliver Wendell Holmes, Collected Legal Papers (New York: Harcourt, Brace & Howe, 1920), p 187.

[5] For a complete exposition on the evolution of the governmental/proprietary distinction, see Cooperrider, *The Court, the Legislature, and Governmental Tort Liability in Michigan,* 72 Mich L Rev 187, 219-237 (1973).

Nor do we believe that the Legislature intended that we must today hold the operation of a hospital to be a governmental function because we did so in 1902 and 1950. As was stated in the KAVANAGH-FITZGERALD dissenting opinion in *Thomas v Dep't of State Highways,* 398 Mich 1, 17, fn 4; 247 NW2d 530 (1976), to read the second sentence of MCL 691.1407; MSA 3.996(107)[6] as "preserving for all time state governmental immunity heretofore recognized by case law" would be to "assume that the Legislature failed to recognize that the evolution of case-law precedent is exclusively committed to the judicial branch of government".[7]

Determining whether or not a certain activity is or is not a "governmental function" is a matter of statutory interpretation. In the absence of a legislative definition of the term, statutory interpretation is a function committed to the judiciary. The term "governmental function" is particularly subject to judicial interpretation because the phrase is of judicial origin.

It is time we recognize that our case-law precedent, as it attempts to distinguish between a governmental and a proprietary function, is "inher-

[6] "Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is affirmed."

[7] Compare the interesting California case *Li v Yellow Cab of California,* 13 Cal 3d 804; 532 P2d 1226; 119 Cal Rptr 858 (1975). The California Court adopted a comparative negligence rule in the face of a contributory negligence statute. The Court believed the Legislature's intent in enacting the 1872 statute was to "state the basic rule of negligence together with the defense of contributory negligence modified by the emerging doctrine of last clear chance". Even so, the Court believed the Legislature did not intend to "restrict the courts from further development of these concepts according to evolving standards of duty, causation, and liability".

The effect of the California Court's decision, of course, was to totally nullify the statute. We do not go so far. In defining "governmental function" more narrowly than in the past, we do limit the operation of the statute, yet preserve the doctrine of governmental immunity.

ently unsound".[8] In abrogating common-law judge-made immunity *(Pittman v Taylor,* 398 Mich 41, 49; 247 NW2d 512 [1976]), we recognized the appropriateness of the analysis used to overrule a hospital's charitable immunity to the governmental immunity area of the law. By substituting "definition of governmental function" and "governmental function" for "charitable" and "charities" in *Parker v Port Huron Hospital,* 361 Mich 1, 25; 105 NW2d 1 (1960), we said about charitable immunity then what we wish to say about governmental immunity today:

"The old rule of charitable immunity [definition of governmental function] was justified in its time, on its own facts. Today we have a new set of facts. It is true that the new facts are still described by the same word in our English language—"charities" [governmental function]—but that is because our language has not changed as the facts of our life have changed. *We have new facts described by old nomenclature.* To say that the old rule of law still applies is to reach a result on the basis of nomenclature, not of facts; it is to apply a rule, proper in its time, to completely new facts, and to justify doing so by reference to language merely without regard to the facts." (Emphasis supplied.)

Again, we reject the rigid dichotomy of the past. Because an activity is not proprietary, it does not necessarily follow that the activity is governmental. We would limit the term "governmental function" to those activities *sui generis* governmental —of essence to governing. This principle was rec-

[8] The United States Supreme Court has noted that in the governmental/proprietary "quagmire" "the decisions in each of the states are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound". *Indian Towing Co v United States,* 350 US 61, 65; 76 S Ct 122; 100 L Ed 48 (1955).

Professor Davis has criticized the distinction as "probably one of the most unsatisfactory known to the law". 3 Davis, Administrative Law Treatise, § 25.07, p 460.

ognized in *Lykins v Peoples Community Hospital,* 355 F Supp 52, 53 (ED Mich, 1973):

"This court does not believe the statutory scheme contemplates immunity for the day-to-day operations of a hospital. The statute speaks of immunity for 'governmental functions,' and this court is of the opinion that while it may be an appropriate goal or objective of government to establish a hospital authority, it does not follow that the daily operations of such a hospital authority constitute a governmental function. Governmental functions more properly refer to the tasks of governing. There is, for example, a governmental character to activities such as the collection of taxes or the operation of a court system. But the services of healing offered by a public hospital are not governmental functions."

The operation of a hospital is not an activity of a peculiar nature such that the activity can only be done by government. Rather, government participates alongside private enterprise, charitable and religious organizations in operating hospitals.[9]

In adopting the "of essence to government" test for defining the term "governmental function", we reject the "common good of all" test applied in *Martinson v Alpena, supra.* The operation of a hospital is a noble undertaking on the part of a unit of government. But, the fact that the government-operated hospital contributes to the "common good" does not distinguish the government-operated hospital from the non-government-oper-

[9] The analysis of ownership of hospitals located in Michigan which have registered with the American Hospital Association is as follows:

State and local government	70
Federal government	9
Non-government, not for profit	167
Investor owned, for profit	6
Osteopathic (non-government, not for profit)	2

American Hospital Association, *Guide to the Health Care Field, 1977 Edition,* pp 108-116.

ated hospital.[10] We feel safe in assuming that hospitals operated by non-government entities, who do not enjoy immunity from tort liability, also contribute to the "common good".

The modern hospital, whether operated by a city, a church, or a group of private investors, is essentially a business.[11] As such, there is no rational ground upon which immunity for the government-operated hospital can rest.[12]

Reversed and remanded. No costs, a public question.

KAVANAGH, C.J., and LEVIN, J., concurred with FITZGERALD, J.

[10] Nor do we accept the contention that what distinguishes the government-operated hospital from others, hence entitling it to immunity, is that the government-operated hospital must accept all comers, regardless of ability to pay. In the usual case, it is not the hospital itself that extends "charity", but another arm of government, often a county welfare agency or the Medicare system. In *Martinson, supra*, p 597, although the city hospital apparently accepted indigent patients, the county welfare board paid the bill of those patients. Although government often pays for the health care services extended to indigents, many times the care is provided in non-government operated hospitals.

[11] "Hospitals today are growing into mighty edifices in brick, stone, glass and marble. Many of them maintain large staffs, they use the best equipment that science can devise, they utilize the most modern methods in devoting themselves to the noblest purpose of man, that of helping one's stricken brother. But they do all this on a business basis, submitting invoices for services rendered—and properly so.

"And if a hospital functions as a business institution, by charging and receiving money for what it offers, it must be a business establishment also in meeting obligations it incurs in running that establishment. One of those inescapable obligations is that it must exercise a proper degree of care for its patients, and, to the extent that it fails in that care, it should be liable in damages as any other commercial firm would be liable."

Flagiello v Pennsylvania Hospital, 417 Pa 486, 493-494; 208 A2d 193, 196-197 (1965) (overruling charitable immunity).

[12] As noted in *Thomas, supra*, to recognize governmental immunity for the day-to-day operation of a hospital would equate "governmental function" with "governmental participation". If the Legislature had intended that result, surely the first sentence of MCL 691.1407; MSA 3.996(107) would read, "Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability." We do not today decide whether or not such a statute would pass constitutional muster.

BLAIR MOODY, JR., J. *(concurring).* The question of law on this appeal is whether the activities conducted by a municipally owned general hospital providing the public medical service for a fee constitute a governmental function within the meaning of MCL 691.1407; MSA 3.996(107).

It is determined that the activities of such a municipally owned general hospital do not constitute a governmental function. Therefore, this opinion concurs with the result reached by Justice FITZGERALD. However, the reasons for reaching this conclusion differ to some extent from the analysis of my colleagues.

I

Governmental tort immunity in Michigan was originally created by court decision. Early in the state's history, this Court began a slow process of extending protection from tort liability to municipal and state governing units. Often, contrary to strong indications from the Legislature to allow governmental liability, this Court enlarged the scope of governmental immunity. It fashioned the present theory of protection embodied in the "governmental function" concept.[1]

The momentum of these protective decisions continued unabated until the relatively recent case of *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961). The Court in *Williams* held that "the judicial doctrine of governmental immunity" was henceforth abolished in Michigan. However, this Court later restricted the broad sweep of *Williams*

[1] See, generally, Cooperrider, *The Court, the Legislature, and Governmental Tort Liability in Michigan*, 72 Mich L Rev 187 (1973).

to apply only to municipal corporations. *McDowell v State Highway Commissioner,* 365 Mich 268; 112 NW2d 491 (1961).

In response to the *Williams* initiative, the Legislature passed 1964 PA 170. That statute, as amended by 1970 PA 155, included a general provision for immunity:

"Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise and discharge of a governmental function. Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is affirmed." MCL 691.1407; MSA 3.996(107).

Although not defining the term "governmental function", the Legislature did define the concept of "proprietary function":

"The immunity of the state shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as herein defined. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the state, excluding, however, any activity normally supported by taxes or fees." MCL 691.1413; MSA 3.996(113).

The evolution of common-law precedent is committed to the judicial branch of the government. No more striking example of judicial alteration in order to accommodate the needs and responsibilities of the times exists than the ringing pronouncement by this Court in *Pittman v City of Taylor,* 398 Mich 41; 247 NW2d 512 (1976). In *Pittman,* this Court expressly abrogated the an-

cient and maligned common-law doctrine of state governmental immunity.

Likewise, the concepts of governmental and proprietary functions have evolved different meanings over the years.[2] These terms have been judicially manipulated to fit contemporary requirements. In *Thomas v Dep't of State Highways,* 398 Mich 1; 247 NW2d 530 (1976), this Court interpreted the present governmental immunity statute. It was fully recognized that the concept of governmental function was dependent for its meaning upon judicial interpretation.

Several of my colleagues hold the position that the second sentence of the immunity provision requires past precedent to bind our present response to the statute:

"Obviously this language must be construed as an 'affirmation' of case-law precedent on the subject of the state's immunity." *Thomas, supra,* 11.

Thus, since this Court previously held the operation of a general hospital to be a governmental function, the Court would be statutorily bound by the old law. See *Martinson v Alpena,* 328 Mich 595; 44 NW2d 148 (1950).

Rather than adopt this position, particularly in the face of *Pittman, supra,* which erased all common-law immunity precedent, this Court should begin anew its analysis of what a governmental function means under this statute.

Although the Legislature saw fit to statutorily define the term "proprietary", significantly it did not define "governmental" function. Further, it may be discerned that there are actually three

[2] See, generally, Anno: *Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital,* 25 ALR2d 203, §§ 12-14. See, also, Cooperrider, *supra,* 219-237.

categories of activities: proprietary, governmental and an area wherein activities are neither clearly governmental nor proprietary.[3] It is within this presently undifferentiated area that this Court must chart a modern course.

This conclusion was aptly stated by the minority in *Thomas:*

> "We do not, however, construe this sentence [the second sentence of the statutory immunity provision] to be an 'affirmation' of case-law precedent preserving for all time state governmental immunity heretofore recognized by case law. To read it in such a manner would be to assume that the Legislature failed to recognize that the evolution of case-law precedent is exclusively committed to the judicial branch of government." 398 Mich 17, fn 4.

II

Participation of modern government in our everyday existence is so pervasive that any presumption must rightly run to government responsibility and consequent liability rather than to immunity. Present realities dictate viewing immunity as a privilege, limited to those activities uniquely associated with governmental enterprise.

It is held today that activity conducted in a general hospital operated by a municipality is not a governmental function for immunity purposes. This conclusion is predicated on the basis that the term "governmental function" is limited to those activities *sui generis* governmental—of essence to governing.

In *Thomas,* it was suggested that this test meant that a function is not governmental unless the

[3] See *Thomas, supra,* 18-19, fn 7.

particular activity involved has "no common analogy in the private sector". Furthermore, it was observed that the parameter of governmental function will most often "run along the line of distinction between decisional and planning aspects of governmental duties on the one hand, and operational aspects on the other". 398 Mich 21, 22.

Although these concepts may have some significance in given cases when applying the "governmental essence" test, in other instances they could be misleading or inapplicable. For instance, it would be incongruous to find that the operational activities of some public agencies are other than governmental. Likewise, conceivably there could be essential governmental activity which would have some common analogy in the private sector.

To delineate a complete and balanced definition of governmental function within a simplistic format would be presumptuous. However, as a basic guideline, the crux of the governmental essence test should be founded upon the inquiry whether the purpose, planning and carrying out of the activity, due to its unique character or governmental mandate, can be effectively accomplished only by the government. Unless liability would be an unacceptable interference with government's ability to govern, activities that fall outside this parameter, although performed by a government agency, are not governmental functions and therefore not immune.

III

The municipal ownership and operation of a general hospital clearly indicates government participation. The question is whether this participation is uniquely associated with governmental enterprise.

Although not necessarily decisive, the number of private general hospitals is far greater than the number of governmental hospitals in this state.[4] This statistic alone would indicate that the function performed by municipal general hospitals is not uniquely served by government, however much the need for public participation remains.

Further, though the purpose of maintaining public general hospitals is to enhance the health of the citizens of Michigan, the purpose is not one which can only be effectively accomplished in society by the government. It is recognized that public general hospitals in most instances are maintained substantially by patient user charges. The fiscal involvement of government is significantly displaced by private payment.

Moreover, a significant consideration is the fact that government has little direct responsibility for placing patients in public general hospitals. Admitting and discharging patients there is usually a matter of private concern. This situation may be contrasted with public mental hospitals where patients are committed into an institution, often by court order, to fulfill the clear governmental responsibility of caring for those who cannot care for themselves or who present a danger to society. See the Mental Health Code, MCL 330.1001 *et seq.*; MSA 14.800(1) *et seq.*

The day-to-day care afforded to the substantial

[4] As Justice FITZGERALD noted in his opinion, the ownership of hospitals in Michigan registered with the Michigan Hospital Association is heavily weighted toward private ownership:

State and local government	70
Federal government	9
Non-government, not for profit	167
Investor owned, for profit	6
Osteopathic (non-government, not for profit)	2

American Hospital Association, *Guide to the Health Care Field, 1977 Edition*, pp 108-116.

majority of patients in general hospitals is not of a unique character or precipitated by governmental mandate. Activities conducted by the staff of general hospitals are not such as can effectively be accomplished only through government participation. The medical practice performed in the emergency room of a municipal general hospital falls outside the scope of a governmental function contemplated by the statute. See *Lykins v Peoples Community Hospital,* 355 F Supp 52 (ED Mich, 1973).

Further, holding negligent activities of hospital personnel in general hospitals subject to liability is not an unacceptable interference with government's ability to govern.

It also should be noted that a full trial is still forthcoming. At trial, plaintiffs will be required to prove their allegations of malpractice by a preponderance of the evidence. Defendant will have a full day in court. Therefore, though the defense of governmental immunity for public general hospitals is removed, all the safeguards of a trial remain.

Since defendant Highland Park General Hospital was improperly granted summary judgment in this case, I concur in reversing the trial court and remanding the matter for trial.

RYAN, J. *(dissenting).* The question for our consideration in this case is whether the operation of a hospital by a municipality constitutes the exercise or discharge of a governmental function thus immunizing the city from tort liability under MCL 691.1407; MSA 3.996(107). In my view it does, and I would affirm the trial court's grant of defendant city's motion for summary judgment.

MCL 691.1407; MSA 3.996(107) states:

"Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is affirmed."

In *Thomas v Dep't of State Highways,* 398 Mich 1, 10; 247 NW2d 530 (1976), the majority noted that the historical context in which the foregoing statute was enacted suggests that the Legislature intended to codify the state's existing common-law or judge-made immunity and to restore the immunity of municipalities as it existed prior to the 1961 decision of *Williams v Detroit,* 364 Mich 231; 111 NW2d 1 (1961).

At common law, the expression "governmental function" was the term of art which both described the nature and defined the limits of state and municipal immunity from tort liability. By employing that same term of art in creating statutory immunity, the Legislature appears to have directed the courts to look to the common law for guidance in determining whether, in a given case, a governmental agency is exercising or discharging a "governmental function" for purposes of the immunity statute.

Reference to the pre-statutory immunity cases discloses that in *Martinson v Alpena,* 328 Mich 595; 44 NW2d 148 (1950), this Court held that the operation of a public hospital to promote the general public health is indeed a governmental function. Moreover, it seems evident that the operation of a public hospital is within the frequently cited "common good of all" definition of a "governmental function". See *Martinson* and *Gunther v Che-*

boygan County Road Commissioners, 225 Mich 619, 621; 196 NW 386 (1923), citing *Bolster v City of Lawrence,* 225 Mass 387; 114 NE 722 (1917).

I conclude, therefore, that the operation of a public hospital is a governmental function at common law in Michigan and is a governmental function for purposes of the statute in question.

It remains to be determined whether the plaintiffs in this case have alleged in their complaint such specific tortious activity against the City of Highland Park as is within the scope of the immunity the city enjoys.

The complaint alleges that the defendant city, through its agents, servants and employees at the Highland Park General Hospital, was negligent in the examination, diagnosis and treatment of the plaintiff, Vincent Oshee Parker, in failing to discover and remove a piece of glass which was lodged beneath the skin of his back and which remained there for several months after he was treated at the hospital.

Manifestly, the examination, diagnosis and treatment of patients at a public hospital are activities intended to promote the general public health and are exercised for "the common good of all". Consequently, the alleged tortious activity of the defendant city is within the governmental function of operating its municipal hospital. The defendant is immune, therefore, from liability for its negligence, if any, in performing that function in this case by reason of the provisions of MCL 691.1407; MSA 3.996(107).

The trial court was correct in granting the defendant city's motion for summary judgment on the basis of governmental immunity.

I vote to affirm.

WILLIAMS and COLEMAN, JJ., concurred with RYAN, J.

PERRY v KALAMAZOO STATE HOSPITAL

Docket No. 59129. Argued December 9, 1977 (Calendar No. 15).—Decided December 27, 1978.

Leola Perry, administratrix of the estate of James H. Perry, deceased, brought an action against Kalamazoo State Hospital alleging negligence by a hospital attendant in restraining Mr. Perry which resulted in his death while he was a patient at the hospital under an order of the Kalamazoo County Probate Court. The Court of Claims, James E. Hoff, J., granted accelerated judgment for the defendant hospital on the ground of governmental immunity and summary judgment for the hospital for failure to state a cause of action. The Court of Appeals, Bronson, P.J., and Beasley and Anderson, JJ., affirmed in a memorandum opinion (Docket No. 25281). Plaintiff appeals. *Held:*

The operation of the mental hospital in this case was a governmental function, and the hospital has governmental immunity in its operation.

Justice Ryan, with Justices Williams and Coleman concurring, wrote:

1. At common law the expression "governmental function" was the term of art which both described the nature and defined the limits of state immunity from tort liability. By employing the same term of art in creating statutory immunity, the Legislature has directed the courts to look to the common law for guidance in determining whether, in any given case, a governmental agency may invoke the protection of the statute. Case law before the adoption of the immunity statute held that the operation of a public hospital to promote the general public health is a governmental function. Furthermore, the operation of a public hospital is clearly within the "common good of all" definition of a governmental function. Therefore, the operation of a public hospital was a "governmental function" at common law and consequently is a governmental function for purposes of the immunity statute. Defendant's operation as a state mental hospital is generally within the state's immunity because its operation is in the "exercise or discharge of a governmental function".

2. The care, treatment, and custody of patients at a public mental hospital are activities intended to promote the general public health and are exercised for "the common good of all". The plaintiff alleges that the defendant negligently breached its duty to provide for the care, treatment, and custody of its patient when a hospital attendant improperly restrained him. The restraint and control of certain patients in a mental ward is required at certain times in the exercise of the care, treatment, and custody of those patients. Consequently, the alleged negligence of the defendant is within the governmental function of operating a public mental hospital. The defendant is immune, therefore, from liability for its negligence, if any, in performing that function by reason of the immunity statute.

Summary judgment for the defendant for failure to state a claim upon which relief can be granted was proper.

Justice Moody concurred with Justice Ryan that the activities conducted by Kalamazoo State Hospital are governmental functions and, therefore, are immune from governmental liability. Government plays a pervasive role in the area of mental health. The state's annual budget includes a substantial appropriation in this field. The Legislature has declared as public policy "that services for the care, treatment, or rehabilitation of those who are seriously mentally handicapped shall always be fostered and supported" and has mandated the courts to provide for proper civil and criminal disposition of persons who have serious mental diseases. The number of private mental hospitals available is clearly inadequate to deal with the substantial institutional needs of the public. The day-to-day care by an attendant, physician, or other employee on the staff of a mental hospital is a governmental function furthering the public need to segregate, treat, and rehabilitate citizens suffering from mental disease who cannot otherwise care for themselves and who are often committed voluntarily or involuntarily through governmental action. Public mental hospitals perform an essentially unique activity mandated by legislative action, and immunity must be extended to their function. The proper planning and carrying out of this function can effectively be accomplished only by the government. The function is essentially governmental. The Legislature has left the interpre-

REFERENCES FOR POINTS IN HEADNOTES

[1-3, 4-8] 40 Am Jur 2d, Hospitals and Asylums §§ 20-24.
72 Am Jur 2d, States, Territories, and Dependencies § 99 *et seq.*
Immunity from liability for damages in tort of state or governmental unit or agency in operating hospital. 25 ALR2d 203.
[4] 73 Am Jur 2d, Summary Judgment § 26 *et seq.*

tation of "governmental function" to the courts, which must come to grips with the issue on a case-by-case basis.

Affirmed.

Chief Justice Kavanagh, with Justices Levin and Fitzgerald concurring, would reverse the decision of the Court of Appeals.

The term "governmental function" should be limited to those activities *sui generis* governmental—of essence to governing. Even though an activity is not proprietary, it does not necessarily follow that the activity is governmental. Although it may be an appropriate goal or objective of government to establish a mental hospital, it does not follow that the daily operations of the hospital constitute a governmental function. Because the operation of a mental hospital is not an activity of such a peculiar nature that it can only be done by government it is not a "governmental function" and there is no statutory immunity from tort liability.

OPINION OF THE COURT

1. STATES — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — STATUTES — COMMON LAW.

The Legislature, by employing a common-law term of art, "governmental function", in creating statutory immunity from tort liability, appears to have directed the courts to look to the common law for guidance in determining whether, in a given case, a governmental agency is exercising or discharging a "governmental function" for purposes of the governmental tort liability statute (MCL 691.1407; MSA 3.996[107]).

2. STATES — HOSPITALS — MENTAL HEALTH — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — WORDS AND PHRASES.

Case law before the adoption of the governmental tort liability act held that the operation of a public hospital to promote the public health is a "governmental function", and, furthermore the operation of a public hospital is within the "common good of all" definition of a "governmental function"; therefore the operation of a public mental hospital is generally within the state's immunity for purposes of the governmental tort liability act (MCL 691.1407; MSA 3.996[107]).

3. STATES — HOSPITALS — MENTAL HEALTH — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — WORDS AND PHRASES.

Care, treatment, and custody of patients at a public mental hospital are activities intended to promote the general public

health and are exercised for the common good of all, and the restraint and control of certain patients in a mental ward is required at certain times in the exercise of the care, treatment, and custody of those patients; consequently alleged negligence of a state mental hospital attendant in restraining a patient is within the state's governmental function of operating the hospital and the state is immune from liability for its negligence, if any, by reason of the provisions of the governmental tort liability act (MCL 691.1407; MSA 3.996[107]).

4. JUDGMENT — SUMMARY JUDGMENT — STATES — TORTS — GOVERNMENTAL IMMUNITY.

Summary judgment for a defendant state agency for failure to state a claim upon which relief can be granted was proper in a case where the defendant state agency was immune from liability because its alleged negligence was in the performance of a governmental function (GCR 1963, 117.2[1]).

CONCURRING OPINION BY BLAIR MOODY, JR., J.

5. STATES — HOSPITALS — MENTAL HEALTH — TORTS — GOVERNMENTAL IMMUNITY — WORDS AND PHRASES.

Public mental hospitals perform an essentially unique activity mandated by legislative action; governmental immunity for tort liability must be extended to the day-to-day care public mental hospitals provide as a governmental function because the proper planning and carrying out of this function can effectively be accomplished only by the government (MCL 691.1407; MSA 3.996[107]).

6. STATES — TORTS — GOVERNMENTAL FUNCTION — COMMON LAW.

The Legislature has left the interpretation of "governmental function" to the courts, which have the responsibility to come to grips with the issue on a case-by-case basis (MCL 691.1407; MSA 3.996[107]).

DISSENTING OPINION BY KAVANAGH, C.J.

7. STATES — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION.

The term "governmental function" under the governmental tort liability act should be limited to those activities sui generis *governmental—of essence to governing; an activity is not necessarily governmental even though it is not proprietary (MCL 691.1407; MSA 3.996[107]).*

8. STATES — HOSPITAL — MENTAL HEALTH — TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTION — WORDS AND PHRASES.

The day-to-day operation of a mental hospital is not a "governmental function" within the meaning of the governmental tort liability act; the modern hospital is essentially a business and the operation of a mental hospital is not an activity of a peculiar nature such that it can only be done by government (MCL 691.1407; MSA 3.996[107]).

Fieger, Golden & Cousens for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Norbert C. Jaworski* and *Jann Ryan Baugh,* Assistants Attorney General, for defendant.

RYAN, J. We are asked in this case to decide whether the operation of the Kalamazoo State Hospital constitutes the exercise or discharge of a governmental function for purposes of the statutory grant of immunity to the state from tort liability found in MCL 691.1407; MSA 3.996(107). We hold that it does and affirm the trial court's grant of defendant's motion for summary judgment.

I

James Herschel Perry was a resident of Kalamazoo State Hospital on November 14, 1972. On that day, a hospital attendant, in the course of performing his routine duties, found it necessary to restrain Mr. Perry. In so doing, the attendant rendered Mr. Perry unconscious. The attendant then laid Mr. Perry on his back which caused the aspiration of his stomach contents and resulted in his death.

Plaintiff, administratrix of the estate of James Herschel Perry, filed a complaint in the Court of

Claims alleging that defendant breached its duty to provide for the care, treatment and custody of Mr. Perry.[1]

Defendant moved for summary judgment on the basis that it was immune from liability under the governmental immunity statute, MCL 691.1407; MSA 3.996(107).

Following argument, the trial court granted defendant's motions for summary judgment. The Court of Appeals affirmed in a memorandum opinion.

We granted leave to appeal. 399 Mich 894 (1977). We affirm.

II

The governmental immunity statute provides:

"Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is affirmed." MCL 691.1407; MSA 3.996(107).

The historical context in which this statute was

[1] Plaintiff's amended complaint sets forth the following allegations:

"5. That defendant hospital has a duty to provide for the care, treatment and custody of its patients.

"6. That defendant hospital breached its duty in that on or about the evening of November 14, 1972, an employee of defendant hospital caused the death of James Herschel Perry by applying such force to the deceased's neck as to produce unconsciousness. Further, this force caused aspiration of the stomach contents and hemorrhages in the bronchial alveoli area thereby causing the death of James Herschel Perry."

enacted suggests that the Legislature's intent in adopting this act was to codify the existing common-law or judge-made immunity of the state. *Thomas v Dep't of State Highways*, 398 Mich 1, 10; 247 NW2d 530 (1976).

The phrase "governmental function" was a term of art at common law. It was used to both describe the nature and define the limits of the state's immunity from tort liability. By utilizing that same term of art in creating statutory immunity, the Legislature has directed the courts to look to the common law for guidance when faced with determining whether the state may invoke the protection of the statute in any given case.

A review of the case law of governmental immunity that existed prior to the legislative affirmation of the state's immunity provides guidance to this Court in two respects. First, the factual questions resolved in those decisions provide concrete examples of the specific activities contemplated by the Legislature when employing the term "governmental function". Second, that case law provides a definition of the term "governmental function".[2]

Reference to the pre-statutory immunity cases reveals that this Court has held that the operation of a public hospital to promote the general public health is a governmental function. *Martinson v Alpena*, 328 Mich 595; 44 NW2d 148 (1950).

Furthermore, the operation of a public hospital

[2] In *Thomas v Dep't of State Highways*, 398 Mich 1; 247 NW2d 530 (1976), we recognized because past precedent is less than clear in many areas, we are effectively forced to decide on a case-by-case basis which activities may be classified as a governmental function and thus entitled to immunity. We invited the Legislature to relieve the uncertainty and potential for confusion in this area by enacting more specific guidelines. However, to this date the Legislature has not chosen to respond.

comes clearly within the frequently cited "common good of all" definition of governmental function.[3]

This leads to the conclusion, therefore, that the operation of a public hospital was a "governmental function" at common law in Michigan and consequently is a governmental function for purposes of the immunity statute. Defendant's operation as a state mental hospital is generally within the statute's immunity because its operation is in the "exercise or discharge of a governmental function".[4]

III

The remaining question in our analysis is whether plaintiff has alleged tortious activity by defendant which falls within the scope of its immunity.

Plaintiff's complaint alleges that defendant negligently breached its duty to provide for the care, treatment and custody of its patient, Mr. Perry.

[3] " 'The underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit. If it is, there is no liability, if it is not, there may be liability. That it may be undertaken voluntarily and not under compulsion of statute is not of consequence.' " *Gunther v Cheboygan County Road Commissioners*, 225 Mich 619, 621; 196 NW 386 (1923), citing *Bolster v City of Lawrence*, 225 Mass 387; 114 NE 722 (1917).

[4] This conclusion gains further support in this case from Const 1963, art 4, § 51, which provides:

"The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.",

and from Const 1963, art 8, § 8, which provides:

"Institutions, programs and services for the care, treatment, education or rehabilitation of those inhabitants who are physically, mentally or otherwise seriously handicapped shall always be fostered and supported."

The State Department of Mental Health controls and operates the Kalamazoo State Hospital pursuant to a statute enacted to effectuate these constitutional declarations of public policy. MCL 330.1116; MSA 14.800(116).

The facts as pled and explained in oral argument allege that this breach occurred when a hospital attendant improperly restrained Mr. Perry.

The care, treatment and custody of mental patients at a public hospital are activities intended to promote the general public health and are exercised for "the common good of all". The restraint and control of certain patients in a mental ward is required at certain times in the exercise of the care, treatment and custody of those patients. Consequently, the alleged tortious activity of defendant is within the governmental function of operating a public mental hospital. The defendant is immune from liability for its negligence, if any, in performing that function, by reason of MCL 691.1407; MSA 3.996(107).

The trial court was correct in dismissing the action. GCR 1963, 117.2(1).

Affirmed. No costs, a public question being involved.

WILLIAMS and COLEMAN, JJ., concurred with RYAN, J.

BLAIR MOODY, JR., J. *(concurring).* I concur with Justice RYAN that the activities conducted by the Kalamazoo State Hospital, a public mental hospital, are governmental functions and, therefore, are immune from tort liability. The opposite conclusion was reached relative to general hospitals in *Parker v Highland Park, ante,* 404 Mich 183; — NW2d — (1978), also decided today. Accordingly, it may be gleaned that my rationale for retaining immunity in this case differs from my colleagues but is consistent with *Parker.*

Government plays a pervasive role in the area of mental health. This state's annual budget includes a substantial appropriation in this field. See, *e.g.,*

1978 PA 407. Our Legislature has declared as public policy, "that services for the care, treatment, or rehabilitation of those who are seriously mentally handicapped shall always be fostered and supported". MCL 330.1116; MSA 14.800(116). See also Const 1963, art 8, § 8.

Furthermore, to advance this public policy the Legislature has mandated the courts to provide for proper civil and criminal disposition of persons who have serious mental disease. See MCL 330.1400 *et seq.;* MSA 14.8000(400) *et seq.;* MCL 330.2050; MSA 14.800(1050). Access to public mental hospitals is essential to effectively process probate and circuit court commitment proceedings. Clearly, the number of private mental hospitals available to the judiciary to deal with the substantial institutional needs of the public is inadequate.

The day-to-day care by an attendant, physician or other employee on the staff of a mental hospital represents a governmental function furthering the public need to segregate, treat and rehabilitate citizens suffering from mental disease who cannot otherwise care for themselves and who often are committed voluntarily or involuntarily through governmental action.

Accordingly, as public mental hospitals perform an essentially unique activity mandated by legislative action, immunity must be extended as a governmental function under the statute. The proper planning and carrying out of this function can effectively be accomplished only by the government. The function is essentially governmental.

It is recognized that an analytical demarcation between general and mental hospitals is far from perfect in this imperfect world. However, the rationale is an attempt to evolve a just application of the term governmental function within the confines of the present statute.

The Legislature has left the interpretation of governmental function to the courts. Of necessity, until this term is definitively refined, it is our responsibility to come to grips with the issue on a case-by-case basis.

The Court of Appeals decision is affirmed.

KAVANAGH, C.J. *(for reversal).* The issue here is whether the operation of a state mental hospital is a "governmental function", rendering the state immune from tort liability under MCL 691.1407; MSA 3.996(107). For the reasons stated by Justice FITZGERALD in *Parker v Highland Park, ante,* 404 Mich 183; — NW2d — (1978), we hold that it is not.

The statute provides:

"Except as in this act otherwise provided, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided herein, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed heretofore, which immunity is affirmed." MCL 691.1407; MSA 3.996(107).

In order to constitute a "governmental function" under the statute, the activity must be *"sui generis* governmental— of essence to governing". *Parker,* 193. Because the operation of a mental hospital is not an activity which can be done only by the government, it is not a "governmental function" and there is no statutory immunity from tort liability.

LEVIN and FITZGERALD, JJ., concurred with KAVANAGH, C.J.

Rehearing No. 476

LEOLA PERRY, Administratrix of the Estate of JAMES HERSCHEL PERRY, deceased,

Plaintiff-Appellant,

v 59129

KALAMAZOO STATE HOSPITAL,

Defendant-Appellee.

In this cause a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, held at the Supreme Court Room, in the City of Lansing, on the 10th day of April in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable

MARY S. COLEMAN,
Chief Justice,

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

COA: #25281
LC: #3366

STATE OF MICHIGAN

IN THE SUPREME COURT

LEOLA PERRY, Administratrix of the Estate of JAMES HERSCHEL PERRY, Deceased,

Plaintiff-Appellant,

v No.

KALAMAZOO STATE HOSPITAL,

Defendant-Appellee.
_____/

NOTICE OF APPEAL

Plaintiff-Appellant Leola Perry appeals from the judgment rendered by the Supreme Court of the State of Michigan on December 27, 1978, reh'g den April 10, 1979.

This appeal is taken under 28 USCA §1257.

/s/ MARK H. COUSENS

FIEGER, COUSENS & BOESKY
Attorneys for Plaintiff-Appellant
MARK H. COUSENS (P 12273)
19390 West Ten Mile Road
Southfield, Michigan 48075
(313) 355-5555

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-38

LEOLA PERRY, Administratrix of the Estate of James Herschel Perry,

Appellant,

v

KALAMAZOO STATE HOSPITAL,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MOTION TO DISMISS

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Thomas L. Casey
Assistant Attorney General

525 West Ottawa Street
762 Law Building
Lansing, Michigan 48913
(517) 373-1124

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In the

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LEOLA PERRY, Administratrix of
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v

KALAMAZOO STATE HOSPITAL,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that this appeal be dismissed for the reason that it does not present a substantial federal question and that the federal question sought to be reviewed was neither timely nor properly raised, nor expressly passed upon.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment rendered by the Michigan Supreme Court in *Perry* v *Kalamazoo State Hospital*, 404 Mich 205, 273 NW2d 421 (1978) rehearing denied, 406 Mich 1118, ... NW2d .... (1979) affirming the dismissal of Appellant's state court tort action against a state mental hospital.

As set forth in the opinion of the Michigan Supreme Court, 404 Mich at 209-210, the facts of this case are as follows:

> "James Herschel Perry was a resident of Kalamazoo State Hospital on November 14, 1972. On that day, a hospital attendant, in the course of performing his routine duties, found it necessary to restrain Mr. Perry. In so doing, the attendant rendered Mr. Perry unconscious. The attendant then laid Mr. Perry on his back which caused the aspiration of his stomach contents and resulted in his death.
>
> "Plaintiff, administratrix of the estate of James Herschel Perry, filed a complaint in the Court of Claims alleging that defendant breached its duty to provide for the care, treatment and custody of Mr. Perry.
>
> "Defendant moved for summary judgment on the basis that it was immune from liability under the governmental immunity statute, MCL 691.1407; MSA 3.996(107).
>
> "Following argument, the trial court granted defendant's motion for summary judgment. The Court of Appeals affirmed in a memorandum opinion.
>
> "We granted leave to appeal. 399 Mich 894 (1977). We affirm." (Footnote omitted).

ARGUMENT

I.

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE NEITHER TIMELY NOR PROPERLY RAISED NOR EXPRESSLY PASSED UPON BY THE MICHIGAN SUPREME COURT.

In its jurisdictional statement filed in this Court, Appellant asserts the existence of two federal questions: (1) Whether Michigan's statute providing for immunity from tort liability (with certain exceptions not relevant here) for all government agencies engaged in the exercise and discharge of a governmental function deprives Appellant of the allegedly fundamental personal right to seek health care and (2) Whether the immunity statute deprives Appellant of equal protection of the laws. Assuming, *arguendo*, that these allegations raise federal questions, Appellee submits that they were not timely or properly raised, or expressly passed on in the state court proceedings and therefore pursuant to Rule 16(b) of the Rules of the Supreme Court of the United States the appeal should be dismissed.

The statute conferring appellate jurisdiction upon this Court to review final judgments or decrees rendered by the highest court of a state requires that there be "drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 USC § 1257(2). As is self-evident from the "Amended Complaint" filed in the state trial court (Appellant's App 8a-9a) Appellant did not draw in question the validity of Michigan's governmental immunity statute. Furthermore, despite the statement on page nine of Appellant's jurisdictional statement

filed in this Court that the constitutional question was raised in the brief in the Michigan Supreme Court, the record of the state court proceedings amply demonstrates that the federal question was, in fact, not timely or properly raised. The "Statement of Questions Involved" which appears in Appellant's brief filed in the Michigan Supreme Court lists the two issues as follows, *Perry* v *Kalamazoo State Hospital, supra,* docket no. 59129, Appellant's Brief and Appendix page v:

> "1. Whether the operation of the Kalamazoo State Hospital is a governmental function within the meaning of MCLA 691.1407.
>
> "• • •
>
> "2. Whether MCLA 691.1047 is violative of the constitution of the State of Michigan by reason of depriving Appellant of the equal protection of the laws."

Appellant's disingenuous statement on page nine of its jurisdictional statement that the Michigan Supreme Court "declined" to pass upon the federal question is explained by the simple fact that no federal question was presented to that court.

Appellant's failure, in the state court, to draw in question the validity of Michigan's governmental immunity statute on the ground of its being repugnant to the constitution of the United States deprives this Court of appellate jurisdiction to review the judgment of the Michigan Supreme Court, 28 USC § 1257(2), and, in addition, this Court has uniformly held that it is without jurisdiction unless the federal question was presented for decision to the state courts. *Live Oak Water Users Association* v *Railroad Commission of California,* 269 US 354 (1926); *Lynch* v *New York ex rel Pierson,* 293

US 52 (1934). In *Lynch* this Court held that a claim of jurisdiction cannot be sustained by references to briefs and statements which are not part of the record and went on to note, 293 US at 54:

> "It is essential to the jurisdiction of this court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

In the instant case, no federal question was presented by Appellant's complaint in the state trial court and no federal question was timely or properly raised or expressly passed on in the Michigan Supreme Court. Thus, this appeal should be dismissed.

THIS APPEAL DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION.

The opinion of the Michigan Supreme Court from which this appeal is taken held only that the operation of a State mental hospital constitutes the exercise or discharge of a "governmental function" as that term is defined in the Michigan statute conferring immunity from tort liability upon governmental agencies. In asserting the existence of a federal question in this Court, Appellant posits the existence of a constitutional right to seek health care at state-operated hospitals and goes on to assert that the opinion interpreting the governmental immunity statute "potentially affects" the choice of health care, thus resulting in a deprivation of con-

stitutional rights. The dearth of authority in Appellant's jurisdictional statement is not surprising when it is realized that no case has ever acknowledged the existence of any such constitutional right and when it is further realized that Appellant's argument is based upon the wholly unfounded assumption that the availability of any such health care services is affected by the existence *vel non* of the right to bring a lawsuit for tort liability against the health care provider. Appellant's assertion of a substantial federal question, therefore, is based upon an entirely novel and unsupported theory of an alleged constitutional right to health care and upon the assumption—totally lacking in factual support—that the availability of this constitutional right is totally dependent upon the tort liability of government agencies.

Appellee submits that upon the record of this case there is neither factual nor legal support for Appellant's position and that this question is not so substantial as to require plenary consideration, with briefs on the merits and oral argument for its resolution. Rule 15.1(e), Rules of the Supreme Court of the United States.

In its jurisdictional statement, Appellant has also asserted that the Michigan statute providing immunity from tort liability for government agencies engaged in the exercise or discharge of a governmental function somehow deprives her of equal protection of the laws, but this argument, too, is without merit. The Michigan governmental immunity statute reflects a legislative determination that the ongoing operation of state government requires that government agencies enjoy a certain amount of immunity from tort liability for actions undertaken in the exercise or discharge of governmental functions. Because no suspect classification or fundamental right is involved here, the statute must be upheld "if any state of facts reasonably may be conceived to justify it." *McGowan* v *Maryland*, 366 US 420 (1961). In MCLA

691.1407 the Michigan legislature provided that governmental agencies are immune from tort liability while engaged in the exercise and discharge of governmental functions. Certain exceptions were statutorily created (liability for injuries caused by defective highways, MCLA 691.1402; liability caused by negligent operation of government-owned vehicles, MCLA 691.1405; liability for injuries caused by dangerous condition of government buildings, MCLA 691.1406) but in conferring a general grant of immunity from tort liability the legislature rationally concluded that such immunity was necessary in order to conserve state resources and to insure that state agencies and officials would be able to execute their official duties without fear of reprisal by way of suits for money damages. The legislative determination that governmental efficiency and effectiveness are enhanced by providing immunity from tort liability is a rational one, and although it might be subject to criticism as a matter of social policy, that legislative determination is clearly a legitimate exercise of the Michigan legislature's constitutional power and does not result in a deprivation of Appellant's right to equal protection of the laws.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Thomas L. Casey
Assistant Attorney General

762 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124